

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,	:	
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-v-	:	00 CIV. 9521 (DLC)
	:	00 CR. 52
	:	
KARINA PACHECO	:	<u>OPINION AND ORDER</u>
Defendant.	:	
-----X	:	

For the Government:
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For Defendant:
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DENISE COTE, District Judge:

On December 1, 2000, Karina Pacheco ("Pacheco") was sentenced to a term of imprisonment of one year and a day for bribing a federal official, in violation of 18 U.S.C. § 201(b)(1) and immigration document fraud, in violation of 18 U.S.C. § 1546. She is due to surrender on February 1, 2001. Pacheco has moved for bail pending appeal and in the alternative to correct her sentence pursuant to 28 U.S.C. § 2255. For the following reasons both applications are denied.

BACKGROUND

On January 19, 2000, Pacheco was indicted along with co-defendant Consuelo Aviles ("Aviles") for bribery of a public official and immigration document fraud. Pursuant to a Pimentel letter, Pacheco pled guilty to both counts on June 23, 2000. Through a nine-page written submission of November 20, 2000,

Pacheco's counsel argued for a minor role adjustment, and a downward departure on several grounds, including aberrant behavior, charitable acts and good deeds, family circumstances, extraordinary rehabilitation, and a combination of mitigating factors. Approximately 25 letters or documents were attached to the submission.

At the sentencing proceeding for Aviles and Pacheco on December 1, 2000, the Court addressed each of the motions made on behalf of the two defendants. With particular relevance to the arguments presented through applications now pending, the Court found that a minor role adjustment was unwarranted.

Ms. Pacheco was in some ways a partner in life and in work with Ms. Aviles. They had a very close intimate bond and while Ms. Aviles had a leadership role and was the prime mover in this criminal activity, I think that she depended for significant acts in connection with this on Ms. Pacheco and Ms. Pacheco, as far as I can determine, based on the information submitted to me, was a willing and effective participant and a necessary participant and a significant participant in those acts. She participated in meetings. She participated in handing over \$7,000 in cash as part of a bribe to the INS agent. She participated in the preparation of fraudulent documents of more than one kind and the forgery of signatures on those documents.

The Court also rejected Pacheco's motion for departures based on aberrant behavior, charitable acts and good deeds, extraordinary rehabilitation, and a combination of mitigating factors.

The Court did depart down for Pacheco's co-defendant, sentencing Aviles to five years probation, on the ground of extraordinary family circumstances. A large portion of the sentencing proceeding was devoted to a discussion of this basis for departure and whether it was appropriate for either

defendant. Although it is undisputed that Aviles is more culpable than Pacheco, it is also undisputed that Aviles is better equipped to handle the demands presented by the most afflicted family members: her mother who is suffering from dementia, her brother who is dying from AIDS, and her dying brother's teenage son. All three of these individuals, as well as other family members, live with Aviles.

Pacheco is related to Aviles and these afflicted individuals by marriage and has been living in the same household for some years. When the Court questioned whether Pacheco is "capable of caring for the family members in need at home in the absence of Ms. Aviles," however, Pacheco candidly admitted through her attorney that Aviles was better able to care for these individuals than she was. Her attorney said:

Ms. Pacheco has indicated . . . that I should suggest to the Court that if someone would have to serve jail time in this case, that she basically would volunteer to do so if one of the two defendants would have to go in during the course of this sentencing. My question to her just now is could you do what [Aviles] does if [Aviles] were not available. Her answer was no. Her answer was that if anyone can do this, Ms. Aviles can do it. She has the resources. She has the ability to deal with the family members, not Ms. Pacheco.

This was consistent with Aviles' own response at that time, who shook her head no in response to the Court's question.

The Court sentenced Aviles to five years of probation, departing down based on extraordinary family circumstances, and, as noted, sentenced Pacheco to a term of imprisonment of one year and a day. The Sentencing Guidelines range for each defendant was 12 to 18 months.

Pacheco filed a notice of appeal on December 11, 2000. On December 13, 2000, new counsel for Pacheco wrote to the Court asserting without explanation that there was a material mistake of fact in the sentencing of Pacheco, and that she would move to correct the sentence to reflect a downward departure for extraordinary family circumstances, pursuant to 28 U.S.C. § 2255, or, in the event there was no correction in the sentence, for release pending appeal based on ineffective assistance of counsel at sentence and the denial of a minor role adjustment. At a conference on December 20, Pacheco's counsel represented to the Court that Pacheco's appeal and bail application are also based on the Court's decision not to make a minor role adjustment.

DISCUSSION

Pacheco's Section 2255 motion asserts that her sentence was based on material mistakes of fact and that Pacheco received ineffective assistance of counsel. Title 28, United States Code, Section 2255 provides that "[a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence." (Emphasis supplied.) Generally, defendants cannot substitute a collateral attack on their conviction through a Section 2255 petition for a direct appeal. See Stantini v. United States, 140 F.3d 424, 426 (2d Cir. 1998).

It is also inappropriate for a district court to substantively modify a judgment while an appeal is pending. United States v. Ransom, 866 F.2d 574, 576 (2d Cir. 1989) (per

curiam); United States v. Grullon, 96 Cr. 466, 1997 WL 739082, at *1 (S.D.N.Y. Nov. 25, 1997). This Court can, however, address the claims raised by defendant in order to "act in 'aid of the appeal,'" United States v. Nichols, 56 F.3d 403, 411 (2d Cir. 1995) (quoting Ransom, 866 F.2d at 575-76), and to supplement the record such that remand by the Second Circuit for additional fact-finding may be unnecessary, see United States v. Pena, 233 F.3d 170, 174 (2d Cir. 2000). It is also appropriate to address the claims in Pacheco's 2255 motion, as well as her claim that the Court erred in denying her motion for a minor role adjustment, in order to determine whether they raise a "substantial question" that would merit granting bail pending her appeal.

1. Mistakes of fact

Pacheco asserts that the Court made mistakes of fact in deciding her sentence. A district court's "material misapprehension" of fact can violate due process. United States v. McDavid, 41 F.3d 841, 843-44 (2d Cir. 1994). The Court, however, did not make mistakes of fact in Pacheco's sentencing.

First, Pacheco speculates that the Court may have been misled by the Government's argument that the disabled individuals who need care are relatives of Aviles and not Pacheco. Pacheco points out that although Aviles is separated from her husband, Pacheco and Aviles remain sisters-in-law. Pacheco has not identified anything said by the Court at sentencing which indicates any confusion on this issue.

The Presentence Reports for Aviles and Pacheco indicate that

Pacheco's half-brother Lenin Aviles was married to Aviles in 1986, and was separated from Aviles approximately three years ago, although he provides support for his two children and maintains regular contact with them. They also reflect that Pacheco lives with Aviles and that together the two women have provided financially and were care-givers for Aviles' two children, Aviles' nieces aged 18 and 19, Aviles' mother, Aviles' brother, wife and child, and another brother of Aviles and his son. In addition, Pacheco's twenty-six year old sister recently joined the household.

As the transcript of the sentencing proceeding repeatedly reflects, the Court was well aware of the contents of the Presentence Reports and the sentencing submissions, including the many letters submitted on behalf of the two defendants. The Court was aware that these two women had a very close, personal bond, and that they had supported financially and were responsible for a large household that included some very seriously ill individuals and others needing care. Although there was no confusion about the legal status of the connection between Aviles and Pacheco, that legal status was far less significant than the other exceptionally strong bonds between the two women and their household.

The second alleged mistake of fact concerns the statement at the sentencing proceeding by Pacheco's attorney to the effect that if only one of the two defendants were to be allowed to remain free to care for the most disabled family members, then that person should be Aviles. Even now, in her challenge to her

sentence, Pacheco freely admits that Aviles is better able to care for the most needy family members. Pacheco contends, however, that the Court erred in not finding that the family needed both women to receive adequate care and support.

In considering Pacheco's motion for a departure based upon extraordinary family circumstances, the Court considered Pacheco's "stunning and moving admission . . . that she is not a competent caretaker for those most in need" in her household, and concluded, in denying Pacheco's motion, that her statement was "extraordinary" but also "accurate." Pacheco argues that the Court erred in finding that she is not a "competent caretaker," and contends that she is competent, although, she acknowledges, not as competent as Aviles. Taken in context, it is clear that the Court's decision not to depart was based on its evaluation that Aviles was far better able to care for the most needy family members. This is particularly so as to Aviles' mother, for whom care is so challenging that her other children have refused to care for her should Aviles be incarcerated.

Pacheco's argument, at its heart, is that the Court erred in finding that a departure based on extraordinary family circumstances was warranted for only one of the defendants as opposed to both. A district court has the discretion not to downwardly depart, and the exercise of this discretion is not reviewable unless the court had a "mistaken belief that it lacked authority to depart." United States v. Pollack, 91 F.3d 331, 336 (2d Cir. 1996) (quotation omitted). The Court was well aware of its power to depart and declined to do so in light of all of the

information before it at the time of sentence.

2. Ineffective Assistance of counsel

Pacheco argues that she received ineffective assistance of counsel at the time of sentence when her attorney incorrectly indicated that she and Aviles were no longer legally related and when he failed to press adequately the argument that the family's needs required a departure for both defendants. In order to prevail on a claim of ineffective assistance of counsel, a petitioner must show that "(1) counsel's performance was unreasonably deficient under prevailing professional standards, and, (2) but for counsel's unprofessional errors, there exists a reasonable probability that the result would have been different." United States v. Torres, 129 F.3d 710, 716 (2d Cir. 1997) (citing Strickland v. Washington, 466 U.S. 668, 688, 694 (1984)). A "reasonable probability" is one "sufficient to undermine confidence in the outcome." Flores v. Demeskie, 215 F.3d 293, 304 (2d Cir. 2000) (citing Strickland, 466 U.S. at 694). There is a strong presumption that counsel's conduct falls within the "wide range of reasonable professional assistance." United States v. Aguirre, 912 F.2d 555, 560 (2d Cir. 1990). The right to effective assistance of counsel, however, may be violated by "even an isolated error of counsel if that error is sufficiently egregious and prejudicial." Murray v. Carrier, 477 U.S. 478, 496 (1985).

Pacheco was well represented at sentence. When the transcript of the sentencing proceeding is read in its entirety, it is obvious that her attorney argued forcefully for a reduction

in her sentence. None of the things said by Pacheco's counsel to which she now points would have resulted in a different sentence. Indeed, she does not dispute what remains a central fact in any determination with regard to the departure motion based on extraordinary family circumstances: Aviles is better able to care for Aviles' mother and brother and those most in need in the household. Because Pacheco's 28 U.S.C. § 2255 motion presents no factual disputes that require a hearing, and its claims are "clearly meritless," Pacheco's request for a hearing is denied. Graziano v. United States, 83 F.3d 587, 590 (2d Cir. 1996).

B. Bail Pending Appeal

Pacheco moves in the alternative for bail pending appeal on the ground that she has raised substantial questions of law likely to result in a reduced sentence. A district court can grant bail pending appeal if it finds:

- (A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community . . . and
- (B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in --
 - (i) reversal,
 - (ii) an order for a new trial,
 - (iii) a sentence that does not include a term of imprisonment, or
 - (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

18 U.S.C. § 3143(b) (emphasis supplied). In deciding whether to grant bail, a district court must first determine that a question raised on appeal is "substantial." A substantial question "is one of more substance than would be necessary to a finding that it was not frivolous. It is a 'close' question or one that very

well could be decided the other way." United States v. Randell, 761 F.2d 122, 125 (2d Cir. 1985) (internal quotation omitted) (noting preference for definition in United States v. Giancola, 754 F.2d 898, 901 (11th Cir. 1985)). If the question raised on appeal is "substantial," the court must then consider whether that question is "'so integral to the merits of the conviction on which defendant is to be imprisoned that a contrary appellate holding is likely to require'" a defendant to serve less time in prison. Id. (quoting United States v. Miller, 753 F.2d 19, 23 (3d Cir. 1985)). Based on the discussion above, Pacheco's claims related to the departure motion and the performance of her counsel at sentence do not raise substantial questions of law.

Pacheco's counsel also represented in the December 20 conference that Pacheco's bail application and appeal were based on a claim that she should have received a minor role adjustment, although this issue was not addressed in her motion papers. The Sentencing Guidelines provide for a two-level reduction in offense level if it finds that the defendant was a "'minor participant in criminal activity' . . . as compared to the average participant in such a crime." United States v. Rahman, 189 F.3d 88, 159 (2d Cir. 1999) (quoting U.S.S.G. § 3B1.2(b)). At sentencing, the Court considered and denied Pacheco's motion for a minor role adjustment. As described above, the Court concluded that Ms. Pacheco was a "willing," "effective," "necessary" and "significant" participant in the criminal activity and that, based on the undisputed facts regarding her extensive involvement in the scheme, a minor role adjustment was

inappropriate. That decision does not raise a substantial question of law or fact that merits granting bail pending appeal.

CONCLUSION

The motion by Pacheco for bail pending appeal is denied.

To the extent that any motion pursuant to Section 2255 may be brought at this time, it and the request for a certificate of appealability are also denied. I find that the petitioner has not made a substantial showing of the denial of a constitutional right and appellate review of this collateral attack is therefore not warranted. See Tankleff v. Senkowski, 135 F.3d 235, 241 (2d Cir. 1998). In addition, I find, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from the denial of the Section 2255 petition would not be taken in good faith. See Coppedge v. United States, 369 U.S. 438 (1962).

SO ORDERED:

Dated: New York, New York
January 25, 2000

DENISE COTE
United States District Judge